

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MUHAMMED TILLISY,

Petitioner,

v.

UNITED STATES FEDERAL BUREAU OF  
PRISONS,

Respondent.

Case No. C14-1768 RSM-BAT

**REPORT AND  
RECOMMENDATION**

Petitioner Muhammed Tillisy, proceeding *pro se* and *in forma pauperis*, submitted a petition for writ of mandamus pursuant to 28 U.S.C. § 1361. Dkt. 7. Mr. Tillisy also seeks the appointment of counsel. Dkt. 8.

Mr. Tillisy is currently held at the Federal Detention Center (FDC) at Sea-Tac. Mr. Tillisy seeks an order compelling the U.S. Marshal and the Federal Bureau of Prisons (BOP) to place him in a “higher care level” institution because he is allegedly not receiving the medical care he requires at the FDC. *Id.* Because it appeared that his petition is subject to dismissal because it seeks relief beyond that permitted by a writ of mandamus and Mr. Tillisy has failed to exhaust administrative remedies, the Court granted leave to Mr. Tillisy to explain why his petition should not be dismissed and file an amended petition that cures, if possible, the deficiencies noted. Dkt. 9. Mr. Tillisy has failed to do so. The Court recommends that this

1 action be dismissed without prejudice and that Mr. Tillisy's motion for counsel (Dkt. 8) be  
2 denied.

### 3 DISCUSSION

4 The federal mandamus statute provides that "[t]he district courts shall have original  
5 jurisdiction of any action in the nature of mandamus to compel an officer or employee of the  
6 United States or an agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.  
7 Mandamus is an extraordinary remedy. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir.1994). A  
8 writ of mandamus is appropriately used only when (1) the petitioner's claim is "clear and  
9 certain"; (2) the respondent official's duty to act is ministerial and (3) no other adequate remedy  
10 is available. *Id.* (citing *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir.1986)).

#### 11 A. Scope of Relief Requested Exceeds Mandamus Jurisdiction

12 Mr. Tillisy has not presented a claim that is sufficiently clear and certain. Mr.  
13 Tillisy's mandamus request is based on the alleged failure of unnamed FDC medical staff to  
14 provide him with the Oxycodone pain medication prescribed for him by hospital staff after his  
15 brain surgery in July 2013. Mr. Tillisy further alleges that FDC does not have a 24-hour medical  
16 staff who can facilitate a life-threatening condition such as his and because of his condition, he  
17 should be placed at a facility that provides a higher level of care. Dkt. 1, pp. 2-3. According to  
18 Mr. Tillisy, only the U.S. Marshal Service can direct his transfer to another facility.

19 While medical staff at the FDC have a ministerial duty to provide Mr. Tillisy with basic  
20 medical care, Mr. Tillisy's complaint reflects only that he disagrees with the care that he has  
21 received at FDC. There is no medical evidence that the care he has received has been  
22 inadequate. Moreover, decisions to refer Mr. Tillisy to a specialist, provide medication, or  
23 transfer him to a different facility based on his medical needs are all examples of the discretion

1 prison medical staff have in determining treatment. Thus, Mr. Tillisy's claim is not "clear and  
2 certain." In addition, he has remedies other than mandamus available to him.

3 **B. Administrative Remedies**

4 Mr. Tillisy acknowledges that a grievance process exists at the FDC and that his  
5 grievance was denied at the local and regional levels. He also acknowledges that his appeal  
6 remains pending at the Central Office. He claims that the Central Office has violated BOP rules  
7 to provide a response within sixty days and because his appeal has been pending for six months,  
8 he contends that the BOP is preventing him from exhausting.

9 Petitions for writ of mandamus that arise in the context of civil litigation must comply  
10 with the Prison Litigation Reform Act ("PLRA"). *See Martin v. United States*, 96 F.3d 853, 854  
11 (7th Cir.1996). The PLRA requires exhaustion of available administrative remedies for any suit  
12 challenging prison conditions. 42 U.S.C. § 1997e(a). Section 1997e(a) requires complete  
13 exhaustion through any available process and those remedies need not meet federal standards,  
14 nor must they be plain, speedy, and effective. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002). If  
15 administrative remedies have not been exhausted at the time an action is brought, it must be  
16 dismissed without prejudice. *See McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.2002) (per  
17 curiam).

18 Based on the complaint alone, it appears that Mr. Tillisy has not exhausted his  
19 administrative remedies because the appeal remains pending. Mr. Tillisy's allegation that BOP  
20 is "preventing" him from exhausting is not supported by further allegation or evidence. Mr.  
21 Tillisy was directed to show why his complaint should not be dismissed for failure to exhaust but  
22 he has failed to do so.

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1 **C. Injunctive Relief**

2 To the extent Mr. Tillisy's request to be transferred to a different facility with "a higher  
3 level of care" can be construed as a motion for injunctive relief, such relief is not warranted  
4 because, as explained above, Mr. Tillisy has not exhausted administrative remedies as to his  
5 claims. In addition, to be entitled to preliminary injunctive relief, a party must demonstrate "that  
6 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
7 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
8 public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.2009) (citing *Winter v.*  
9 *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)).

10 Mr. Tillisy claims that he is not receiving the pain medication that was prescribed in the  
11 hospital after his surgery in 2013 and that his condition requires that he be in "at least a Care  
12 Level 3 or 4." He contends that FDC does not have 24 hour medical staff and thus, if for  
13 example his shunt were to become infected at night, he would not receive treatment and custody  
14 staff will not call 911 or transport him to the emergency room. Dkt. 1, p.4. While Mr. Tillisy  
15 may have been dissatisfied with his medical provider's refusal to provide him with "Oxycodone"  
16 post-surgery, he has submitted no evidence showing that decisions made by anyone at FDC at  
17 that time or thereafter were medically unsound, let alone a manifestation of deliberate  
18 indifference to his medical needs. In addition, Mr. Tillisy's alleged injury should he not be  
19 granted temporary relief, *i.e.*, the possibility that his shunt will become infected at night and he  
20 will die before he receives treatment, can only be described as speculative. There is no medical  
21 evidence to support such a claim. Speculative injury does not justify finding an immediate threat  
22 of irreparable harm. *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th  
23 Cir.1988).

1 Mr. Tillisy also fails to show a probability of success on the merits of his complaint. Mr.  
2 Tillisy alleges that he suffered severe pain in his head and could not stand for long periods of  
3 time after he was discharged from the hospital in 2013. He provides no evidence or allegations  
4 from which it may be inferred that he suffered from a serious medical need at that time or  
5 thereafter. Nor does he identify any individual at FDC who personally participated in depriving  
6 him of a constitutional right. It must appear in his request that he has some likelihood of proving  
7 that the medical care he received at FDC was constitutionally inadequate. *See Estelle v. Gamble*,  
8 429 U.S. 97, 106 (1976) (prison medical staff provide constitutionally inadequate medical care  
9 when they are deliberately indifferent to a prisoner's serious medical needs). In addition, Mr.  
10 Tillisy cannot succeed on the merits based on a claim of negligence or his own general  
11 disagreement with the treatment he has received. *Estelle*, 429 U.S. at 106; *Hutchinson v. United*  
12 *States*, 838 F.2d 390, 394 (9th Cir.1988).

13 Therefore and to the extent Mr. Tillisy's complaint can reasonably be construed as a  
14 motion for injunctive relief, his complaint should be dismissed.

### 15 CONCLUSION

16 Where a pro se litigant's complaint fails to state a claim upon which relief can be granted,  
17 the Court generally grants him the opportunity to amend the complaint. *Lucas v. Dep't of*  
18 *Corrections*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam). However, the Court may deny leave  
19 to amend if "it is absolutely clear that no amendment can cure the defect." *Id.* Here, Mr. Tillisy  
20 was given an opportunity to amend his complaint but has failed to do so.

21 The Court recommends that Petitioner's § 1361 action be **DISMISSED without**  
22 **prejudice**. Petitioner's motion for counsel (Dkt. 8) should be **DENIED as moot**. A proposed  
23 order accompanies this Report and Recommendation. Any objections to this Recommendation

1 must be filed by **Friday, March 6, 2015**. If Mr. Tillisy believes that further amendment will  
2 cure the deficiencies in his complaint, he may submit a second amended complaint with his  
3 objections. The matter will be ready for Court's consideration on **Tuesday, March 10, 2015** and  
4 the Clerk should so note it. Objections shall not exceed seven pages. The failure to timely  
5 object may affect the right to appeal. The Clerk shall provide a copy of this Report and  
6 Recommendation to Petitioner and to the Honorable Ricardo S. Martinez.

7 DATED this 13th day of February, 2015.

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9 BRIAN A. TSUCHIDA  
10 United States Magistrate Judge  
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